

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of March, two thousand eighteen.

PRESENT:

ROBERT A. KATZMANN,
Chief Judge,
GUIDO CALABRESI,
DENNY CHIN,
Circuit Judges.

YINGSHI LI,
Petitioner,

v.

JEFFERSON B. SESSIONS III,
UNITED STATES ATTORNEY GENERAL,
Respondent.

16-3417
NAC

FOR PETITIONER: Jay Ho Lee, New York, NY.

FOR RESPONDENT: Chad A. Readler, Acting Assistant Attorney General; Anthony W. Norwood, Greg D. Mack, Senior Litigation Counsel, Office of Immigration Litigation, United States Department of Justice, Washington, DC.

1 UPON DUE CONSIDERATION of this petition for review of a
2 Board of Immigration Appeals ("BIA") decision, it is hereby
3 ORDERED, ADJUDGED, AND DECREED that the petition for review
4 is GRANTED.

5 Petitioner Yingshi Li, a native and citizen of the
6 People's Republic of China, seeks review of a September 16,
7 2016, decision of the BIA affirming an April 9, 2013,
8 decision of an Immigration Judge ("IJ") denying Li's
9 application for asylum, withholding of removal, and relief
10 under the Convention Against Torture ("CAT"). *In re*
11 *Yingshi Li*, No. A 200 921 187 (B.I.A. Sept. 16, 2016),
12 *aff'g* No. A 200 921 187 (Immig. Ct. N.Y. City Apr. 9,
13 2013). We assume the parties' familiarity with the
14 underlying facts and procedural history in this case.

15 We have reviewed the IJ's decision as supplemented by
16 the BIA. See *Yan Chen v. Gonzales*, 417 F.3d 268, 271 (2d
17 Cir. 2005). The standards of review are well established.
18 See 8 U.S.C. § 1252(b)(4); *Yanqin Weng v. Holder*, 562 F.3d
19 510, 513 (2d Cir. 2009); *Xiu Xia Lin v. Mukasey*, 534 F.3d
20 162, 165 (2d Cir. 2008).

21 In making an adverse credibility determination, the
22 agency may rely on the applicant's "demeanor, candor, or
23 responsiveness" as well as implausibility or inconsistency

1 in the applicant's statements and other record evidence;
2 however, the "totality of the circumstances" must support
3 the determination. 8 U.S.C. § 1158(b)(1)(B)(iii); *Xiu Xia*
4 *Lin*, 534 F.3d at 163-64. "We defer to an IJ's credibility
5 determination unless, from the totality of the
6 circumstances, it is plain that no reasonable fact-finder
7 could make such an adverse credibility ruling." *Xiu Xia*
8 *Lin*, 534 F.3d at 167. We conclude that the errors in the
9 adverse credibility determination mandate remand.

10 The agency engaged in impermissible speculation in
11 relying on Li's statements at her asylum interview because
12 no record of that interview was submitted into evidence.
13 *See Tandia v. Gonzales*, 437 F.3d 245, 250 (2d Cir. 2006).
14 The agency reasoned that the record was not needed because
15 Li admitted to making the questionable statement that
16 Thanksgiving was an important Christian holiday. The
17 record does not reflect such a straightforward admission.
18 In response to questions about her asylum interview, Li
19 stated that she was "very nervous" during the interview,
20 that "there's no Thanksgiving" in China, and that she does
21 not know what happened when the asylum officer asked
22 whether Thanksgiving Day was more important than the
23 Sabbath. Only once did she respond, "Yes, I know," when

1 the Government asked, "Do you remember saying that?" It is
2 not clear whether she meant she had said Thanksgiving was
3 more important than the Sabbath or that she had expressed
4 confusion during the interview. Compounding the confusion,
5 the Government asked, "And you don't know why you said it?"
6 and Li responded, "There is no why." Given the ambiguity
7 of Li's responses, the BIA erred in distinguishing *Tandia*
8 on the ground that Li admitted to making a specific
9 statement. See *id.* (concluding that IJ impermissibly
10 speculated that statements impugned credibility when
11 interview was not in the record and petitioner could not
12 recall what he said).

13 The IJ also erred in relying on Li's statements to a
14 consular officer in assessing the credibility of her
15 testimony in immigration court. The IJ noted that Li
16 memorized a lengthy story to obtain a U.S. visa, and
17 concluded that this "show[ed] that she has the ability . .
18 . to memorize and recite an extended narrative which is not
19 factual." But making false statements to flee persecution
20 is entirely consistent with the pursuit of asylum. It is
21 "unreasonable" to "penalize an applicant for lying to
22 escape a country where he or she faces persecution." *Rui*
23 *Ying Lin v. Gonzales*, 445 F.3d 127, 134 (2d Cir. 2006).

1 The IJ's drawing of an equivalence between Li's statements
2 to the consulate and her testimony is unwarranted given the
3 differing contexts in which the statements were made. *Id.*

4 Finally, absent any other valid grounds for the adverse
5 credibility determination, the demeanor finding is not
6 supported by substantial evidence. The entirety of the
7 demeanor finding is that Li's testimony appeared "to be
8 rehearsed to reflect the recitation of a story that she had
9 learned, rather than real life events." The IJ provided no
10 reasoning or citation to problematic testimony. Although
11 we generally give "particular deference" to an
12 "adjudicator's observation of the applicant's demeanor,"
13 the finding here lacks any link to the record or sufficient
14 reasoning to allow for judicial review. *Li Hua Lin v. U.S.*
15 *Dep't of Justice*, 453 F.3d 99, 109 (2d Cir. 2006)
16 (observing that demeanor findings are more reliable when
17 supported by "specific examples of inconsistent testimony"
18 (internal quotation marks and citation omitted));
19 *Poradisova v. Gonzales*, 420 F.3d 70, 77 (2d Cir. 2005)
20 ("Despite our generally deferential review of IJ and BIA
21 opinions, we require a certain minimum level of analysis
22 from the IJ and BIA opinions denying asylum, and indeed
23 must require such if judicial review is to be

1 meaningful."). Moreover, "we have never held that a
2 demeanor finding alone is substantial evidence sufficient
3 to support an adverse credibility determination." *Diallo v.*
4 *Holder*, 399 Fed. Appx. 678, 679 (2d Cir. 2010).

5 For the foregoing reasons, the petition for review is
6 GRANTED, the BIA's decision is VACATED, and the case is
7 REMANDED for further proceedings consistent with this order.
8 As we have completed our review, any stay of removal that the
9 Court previously granted in this petition is VACATED, and any
10 pending motion for a stay of removal in this petition is
11 DISMISSED as moot. Any pending request for oral argument in
12 this petition is DENIED in accordance with Federal Rule of
13 Appellate Procedure 34(a)(2), and Second Circuit Local Rule
14 34.1(b).

15 FOR THE COURT:

16 Catherine O'Hagan Wolfe, Clerk of Court